Norris Ward McKinnon Lecture 2022

Delivered at Waikato University by

His Honour Judge John Walker

20 September 2022

Thank you to Norris Ward McKinnon for the invitation to deliver this lecture and for all that this firm has done over many years to further legal education in this region and nationally. I hope that I will not dilute that contribution too much tonight. And I acknowledge the Faculty of Law for its support in hosting this event .

Introduction[1]

A time traveller from Victorian England arriving in a mainstream District Court in New Zealand in 2022 would recognise the general set up and process. Sure, the clothing would be different, and methamphetamine would be a puzzle, likewise harmful digital communications. But a person's name would be called, the person would enter a dock, a charge would be read, a plea taken, a prosecutor and a defence lawyer would make submissions and the judge would pronounce a decision. Participation by anyone else, including the defendant, would be minimal. That much they would recognise.

My proposition is that this unchanged process cannot be supported when we know about the barriers that stop that person in the dock participating in the case about them, that stop victims

[1] I am indebted to my Clerk, Katherine Werry, for her very substantial assistance in the preparation of this paper.

understanding what is happening, that stop supportive whānau understanding and participating in a case that affects the whole whānau.

The repeated calls for transformative change in our courts in report after report, decade after decade, are calls for removal of those barriers, and for a court process that ensures that people who come to court are seen, heard, understood, and are enabled to meaningfully participate in the hearing.

They call for a court process that would not be recognised by our time traveller.

Te Ao Mārama

Today the District Court, in all its jurisdictions, stands ready for transformative change. This time two years ago, on this very occasion, Chief District Court Judge Heemi Taumaunu announced his vision for the District Court: a journey to Te Ao Mārama, or the enlightened world. Chief Judge Taumaunu articulated the vision as ensuring that all those appearing in court – whether they be defendants, whānau, victims or others – are seen, heard, understood and are able to meaningfully participate in the case which is about them.

Most people may think that the courts achieve that anyway – they would rightfully expect that as a matter of fairness. The reality does not, however, meet that expectation. But, we, all of us, can make it so.

What I want to address tonight is how we can and why we should.

I begin by describing the Youth Court experience.

The Youth Court has been on a journey to a more enlightened world since its inception in 1989. There is, I suggest, much to be learned from the way the Youth Court has developed, from its responses to the legislative directions which have been given and how these have been taken

as licence for innovation. Much of what I discuss tonight about the way all courts could operate has its origin in the way the Youth Court already works.

If we look back to 1989, the youth justice system could, with hindsight, be described as being in a state of pō, or darkness. Young people, and young Māori in particular, were being incarcerated at staggering rates, often being removed from their whānau and communities. The number of young people in court and in custody was high, and looked set to continue climbing.

In 1988 the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare in New Zealand was commissioned to advise the Minister of Social Welfare on the approach necessary to meet the needs of Māori in policy, planning and service delivery in the Department of Social Welfare. The committee was chaired by John Rangihau and the members and staff list reads, in retrospect, as a who's who of influential thinkers and emerging leaders. The report which emerged, *Puao-te-Ata-tu*, (day break) resulted in the Children, Young Persons, and their Families Act 1989 (now the Oranga Tamariki Act) and creation of the Youth Court. It was a call for change that did result in, at least, a platform for change.

When that report is read it could well have been written yesterday. The issues remain relevant today. Justice Sir Joseph Williams describes this report, and its aftermath, as "the great awakening of the law".[2] The youth justice system was given the tools to begin to transition from a state of darkness to one of enlightenment.

Some of the principles and tools did lie dormant for decades. For example, Lay Advocates, those appointed to bring a whānau and cultural perspective to the Court, were provided for in the 1989 Act, but it is only in the last 10 years or so that they have become common place in the Youth Court. It was through the innovation of judges that life was breathed into those

---

2 Sir Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 24.

provisions. Youth Court Judges drove the establishment of a process to appoint Lay Advocates, encouraged the use of cultural reports and established Rangatahi and Pasifika Courts. These judge-led initiatives gave life to the words of the statute and the words of *Puao-te-Ata-tu*. The 2019 amendments to the Act sent a clear signal from Parliament that the changes needed in 1989 were still needed 30 years later.

In 1989, the new Act was instantly seen as something different: a "new paradigm", a way to respond to the calls for change and do something different.[3] The consequences of this new approach are evident in the immediate statistical changes.

In the year prior to the introduction of the Act, there were 10,000 young people in the youth justice system in New Zealand and 900 young people in some form of custody.[4] The year after the Act was passed, the number in the youth justice system dropped to around 2000 – one fifth of what it was just one year before.[5] Today, the numbers are the lowest they have ever been. At present, there are about 880 young people total in the youth justice system today, and approximately 120 in lock up custody.[6]

This ongoing trend down in numbers is no comfort to the retailers who have the front of their stores rammed in but the Youth Court process with its multi-disciplinary approach will continue to concentrate on the multiple underlying causes of this behaviour to reduce such offending.

---

3 Dr Allison Morris and Dr Gabrielle M Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26(1) Australian & New Zealand Journal of Criminology 72.

4 Andrew Becroft "Access to Youth Justice in New Zealand: 'The Very Good, the Good, the Bad and the Ugly'" (2012) 18 Auckland U L Rev 23 at 27.

5 At 27.

6 Statistics provided internally by the Ministry of Justice.

If you imagine the graph of the Youth Justice figures and the dramatic and ongoing drop in numbers, it is the opposite of the graphs which would reflect the adult system. I would suggest that examination of the differences in process is justified – there are lessons to be learned.

So, what enabled this dramatic drop in numbers? The foundational principles of the 1989 Act help paint the picture. At the core of the youth justice system in New Zealand, since 1989, is diversion away from formal court settings. One of the guiding principles in the Act states unequivocally that criminal proceedings are to be a matter of last resort, and should not be instituted where there are alternative means of dealing with the matter.[7] A child or young person who commits an offence should be kept in the community so far as is practical and consonant with public safety. As a result, around 75 to 80 per cent of all those children and young people who come to the attention of Police never come before a Youth Court judge.[8] Instead, they are diverted away from court to one of many alternative pathways, fulfilling the guiding legislative principle. The constant unwavering work of Police Youth Aid Officers in this diversionary work continues to be a key pillar of the youth justice system.

Profile of Young Offenders

This emphasis on diversion means that those young people who do come before the Youth Court are the most complex young people with challenging and intersecting needs. I will explore this in more depth later, but it is useful for now to give a brief overview of the profile of young offenders in court. What we see is a high prevalence of neurodisability, FASD,

7 Oranga Tamariki Act 1989, s 208(2)(a).
8 Becroft, above n 4, at 27-28.

dyslexia, autism, head injury, early onset of mental illness, alcohol and other drug dependency often well established.

Dr Ian Lambie released a report in 2020 titled "What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand". In the report, he notes that:[9]

> Research is increasingly showing that a range of brain and behaviour differences, disorders and injuries are prevalent in both youth and adult justice populations, and potentially keep them in that system and hamper rehabilitation.

Many of these young people have suffered exposure to childhood trauma through sexual abuse and physical abuse, and witnessing repeated family violence. That is all still raw and may be their current situation.

In New Zealand every year there are more than 160,000 call outs by Police to a family harm incident.[10] A call to Police about family harm every four minutes.[11] In two thirds of those call outs children are present in the home.[12] When we consider that only 20 per cent of family harm is reported we know we have a very large number of children affected by family harm. It is not surprising that studies have shown that about 80 per cent of child and youth offenders have witnessed or been the victims of family violence in their homes.[13]

Young people in the court are also frequently disengaged from school. In the years before a young person's first contact with the youth justice system, around half have been truant from

---

9 Dr Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, June 2018) at 4.

10 "Daily Occurences of Crime and Family Violence Investigations" New Zealand Police <https://www.police.govt.nz/about-us/statistics-and-publications/data-and-statistics/daily-occurrences-crime>.

11 Dr Ian Lambie *Every 4 minutes: A discussion paper on preventing family violence in New Zealand* (Office of the Prime Minister's Chief Science Advisor, November 2018) at 4.

12 New Zealand Police National Headquarters "Family harm statistics – data supplied on request" (Wellington, New Zealand, 3 October 2018).

13 Dr Ian Lambie *Every 4 minutes*, above n 11, at 4.

school.[14] This has been exacerbated by Covid lockdowns. Children who already had a tenuous connection with school sent home for a lengthy period never to return. The homes they come from could not connect to school remotely.

Solution-Focused Judging

Against this backdrop, the Youth Court system is premised on a solution-focused approach, aimed at addressing the underlying causes of offending.[15] The Youth Court has operated as a solution-focused court long before that term came into being. In this approach the question that is asked is what has caused this person to come to court – what has happened to this person to bring them to this point in their life – not simply what happened in the event, which is a much easier question.

Once that question is answered then a response can be fashioned which addresses those causes. One thing is certain, unless the underlying causes are addressed then the offending behaviour will continue.

There are many statutory requirements in the Oranga Tamariki Act that reflect a solution-focused approach: judges engaging with young people and their whānau, encouraging and assisting them to participate, ensuring approaches taken recognise the particular vulnerabilities of the young and facilitating interagency cooperation.[16] The Youth Court process has the Family Group Conference as a cornerstone providing for the involvement of victims in restorative justice processes. The focus is on meeting the needs of young people in court in a

---

14 Sarah Richardson and Dr Duncan McCann *Youth Justice Pathways: an examination of wellbeing indicators and outcomes for young people involved with youth justice* (Oranga Tamariki – Ministry for Children, April 2021) at 8.

15 Katey Thom "New Zealand's Solution-Focused Movement: Development, Current Practices and Future Possibilities" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 325 at 326.

16 Judge A J FitzGerald "Ko te rongoā, ko te aro, ko te whai kia tika ai, mo ngā rangatahi: Solution-focused justice for young people" (unpublished paper, 2021) at 4-5.

highly personalised way. Identifying and addressing the underlying causes of their offending behaviour.

The purposes of the Act, which apply to the Care and Protection jurisdiction of the Family Court as well as to the Youth Court, are to promote the well-being of children, young persons *and* their families, whānau, hapū, iwi and family group by complying with an extensive list of obligations.[17] These obligations include assisting families, whānau, hapū, iwi and family groups to fulfil their responsibility to meet the needs of their children and young people. A central principle under the Act is that the primary responsibility for caring for the child or young person lies with their family, whānau, hapū, iwi and family group. Finally, a guiding youth justice principle is that measures for dealing with offending by children and young people should be designed in a way that fosters the ability of families, whānau, hapū and iwi to deal with the offending.

There is a kind of reciprocity at play here. The foundational purposes and principles of youth justice led to the decreasing numbers of young people in court. And the low numbers then enable courts to fulfil those purposes and principles to a greater degree.

Today, with the lowest caseload we have ever had, there is the ability for intensive monitoring by the Court and for the multi-disciplinary team in the Youth Court to bring a focussed approach to the relatively small number of cases that do come before the court. It is astounding, yet surprisingly commonplace, that judges, court staff and youth justice stakeholders will know individual young people in custody or in a particular court by name, and know about their background and circumstances. There is no faceless, amorphous mass of defendants. The low numbers enable individualised, and greater, attention to be paid to young people and their whānau.

---

17 Oranga Tamariki Act 1989, s 4(1).

Looking back in the time since 1989, we can see the journey that the Youth Court has been on to its own form of an enlightened world. Would I say that we have achieved a state of Te Ao Mārama? I don't believe that is the case, well not yet, but nor do I believe that we remain in a state of pō.

The dedicated work that is done every day by everybody working in youth justice has placed us firmly on a journey towards Te Ao Mārama. We will always be on a journey, bringing the distant horizon closer with every step.

I have detailed what the Youth Court is seeing and how it seeks to respond to the challenges facing the young people who come before it, and the procedural adaptations that are seen in the Youth Court as necessary to comply with legislation and international conventions.

But here is the thing. The underlying causes of offending, the neurodisabilities, the exposure to trauma and so on, they do not have an expiry date. They do not disappear when a young person comes into the District Court. Yet, we treat these young people as fully functioning adults when demonstrably they are not. The reasons for the accommodations we make in the Youth Court continue to exist.

The Youth Court with its emphasis on identifying the underlying causes of offending, its use of a multi-disciplinary team of professionals in court, its processes encouraging participation and recognising the barriers to participation, the emphasis on plain language, bringing whānau into the process, giving victims a voice, is a court where those involved are seen, heard, understood, and are enabled to meaningfully participate – the key features of Te Ao Marama.

I would say that these features are essentially about fairness, procedurally and substantively, and so they should be a minimum standard of process for all our courts.

Procedural Fairness

There have been various attempts to define the elements of procedural fairness. Some commentators write that procedural fairness has four key elements: voice, neutrality, respectful treatment and trustworthy authorities.[18] Voice is the ability to participate in a case by expressing your own view. Neutrality is having unbiased decision-makers who consistently apply legal principles, and whose decision-making process is transparent. Respectful treatment involves individuals being treated with dignity and having their rights protected. Trustworthy authorities envisage authorities who care, sincerely try to help litigants, listen to individuals and explain their decisions.[19] Others have defined procedural fairness as having two interlinked aspects: concerns about procedures, including whether they are unbiased and whether the litigant has the opportunity to give their view, and concerns about how decision-makers treat participants, and whether such treatment is respectful.[20]

The importance of procedural fairness cannot be overstated. Studies have consistently shown, even though it may seem counterintuitive, that "[m]ost people care more about procedural fairness – the kind of treatment they receive in court – than they do about…winning or losing the particular case".[21] This is particularly true when it comes to losing parties.[22] Losing parties are more likely to accept the outcome if they perceive the method by which the decision was reached as being fair.[23] Conversely, the opposite is true – if the losing party feels as if the

---

18 Kevin Burke and Steven Leben "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44 Ct. Rev. 4 at 6.

19 At 6.

20 Francine Patricia Timmins "Therapeutic Jurisprudence, Justice and Problem-Solving" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 121 at 127.

21 Burke and Leben, above n 18, at 5.

22 Timmins, above n 20, at 126.

23 Burke and Leben, above n 18, at 6.

decision-making process was not fair, this will be a greater source of frustration than the negative outcome itself. Defendants in our criminal courts, the majority of whom plead guilty, cannot really be described as the losing party, they do however submit to an outcome, and they need to understand how that outcome has been reached.

An increased perception of procedural fairness enhances the legitimacy of the court, as well as public trust and confidence in the justice system. Richard L. Wiener writes:[24]

> If offenders perceive that the…court is procedurally fair, produced a balanced outcome, resulted in respect for the offenders, and reconnected them to the positive aspects of their lives, they will view the law as legitimate. As a result, they will comply with judicial orders and ultimately choose healthier behaviours.

Procedural Fairness in the Law

The importance of procedural fairness is enshrined both in domestic legislation and international instruments.

Under the New Zealand Bill of Rights Act 1990, all people have the right to a fair and public hearing by an independent and impartial court.[25] The elements of procedural fairness contained within this right are clear – transparency, independence and impartiality.

Similarly, the Universal Declaration of Human Rights provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal.[26]

Procedural fairness is particularly crucial for those with a disability. Article 13.1 of the Convention on the Rights of Persons with Disabilities says this:[27]

---

24 Richard L. Wiener and others "A testable theory of problem solving courts: Avoiding past empirical and legal failures" (2010) 33 Int'l J & Psychiatry 417 at 423.

25 Section 25(a).

26 *Universal Declaration of Human Rights* GA Res 217A (1948), art 10.

27 *Convention on the Rights of Persons with Disabilities* A/RES/61/106 (2007), art 13.1.

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants…in all legal proceedings…

That sounds like a justification for the Te Ao Marama approach.

One of the International Principles and Guidelines on Access to Justice for Persons with Disabilities is that people with disabilities have the right to appropriate procedural accommodations.[28]

Persons with disabilities are defined in the Convention on the Rights of Persons with Disabilities as including "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[29]

The theme running through these documents is that sometimes, to ensure fairness, we have to change the processes of the courts.

The courts are an institution which privileges certain groups in society, and disadvantage others. Not everyone has the same starting point. Some groups, including those with a disability, will face barriers in accessing justice which others may not.

To give some idea of the scale of these barriers, 60 to 90 per cent of young people in custody have a communication disorder, compared to only one to seven per cent of the general population.[30] Another study into 42 international prisons found that 30 per cent of young

---

28 *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, 2020), principle 3.

29 Article 1.

30 Hughes, above at note 10

offenders, and 26 per cent of adult offenders, had clinically diagnosable ADHD.[31] While there has been no prevalence study of FASD amongst the youth offender population in New Zealand, a comparative study in Australia showed that more than one in three youth in custody had FASD, all of which was undetected before the study.[32] In the District Court, almost 50 per cent of offenders have a traumatic brain injury. This is likely an underestimation, as the data is based on those who go to A&E and/or make an ACC claim. From what we know of those people in court, it is likely that a large number do neither of these. Furthermore, ACC has recognised that Māori are less likely to make successful claims, which will likely have a corresponding effect on these figures.[33]

Unless accommodations are made to remove these barriers, how can we say that our court process is fair?

At the core of Te Ao Mārama is the idea that the processes in the specialist courts which enhance participation, enhance procedural fairness should be mainstreamed, and not be available just in certain courts or certain locations, to prevent what could be described as "postcode justice".

Ensuring that people are seen, heard, understood and able to meaningfully participate in cases about them requires accommodations to be made, processes adjusted, in all of District Courts

---

31 S. Young and others "A meta-analysis of the prevalence of attention deficit hyperactivity disorder in incarcerated populations" (2015) 45 Psychological Medicine 247.

32 Bower, above at note 11

33 Anusha Bradley "ACC biased against women, Māori and Pasifika, agency's own analysis shows" (21 June 2021) Stuff <https://www.stuff.co.nz/national/health/300337952/acc-biased-against-women-mori-and-pasifika-agencys-own-analysis-shows>.

Adult Criminal Court, Youth Court and Family Court and in Civil cases so that our time traveller wonders what this place is.

Seen, Heard, Understood, Meaningfully Participated

With the background of the vulnerabilities facing those we see in court, the importance of the Te Ao Mārama principles – that everyone who comes to court will be seen, heard, understood and enabled to meaningfully participate in the case about them, I hope becomes clear.

Many of the changes I suggest are not radical, nor are they difficult to implement. For example, using plain language comes up again and again as a simple step to ensure that people can understand what is being said and court and are therefore more able to effectively participate. As one young man in prison said to me about language in court, "it would be good if you just talked normal".

Seen

The first element of Te Ao Mārama is that defendants, victims, whānau and others are seen when they are in court. This has two main facets. First, there is being seen in the ordinary sense of the word – the ability to physically appear in court. Second, there is the deeper sense of being seen and acknowledged for who you are.

During the Covid-19 lockdowns, protocols were put into place to allow for more virtual appearances via AVL. This was a move made out of necessity, and I do not deny that the use of technology, including AVL, has a place in our justice system. However, a defendant appearing via AVL may not feel seen to the same extent as if they were physically in the courtroom. The concern with the use of technology is that "the human connection may be degraded".[34] The ability to read somebody's expression and non-verbal cues is especially

[34] Michael Legg and Anthony Song "Commercial Litigation and COVID-19 - the Role and Limits of Technology" (2020) 48 ABLR 159 at 166.

diminished.[35] In the book *The Pixelated Prisoner,* Carolyn McKay describes the difficulties that can occur with video appearances, including blurred or distorted images, lack of eye contact, inability to judge body language and facial expressions.[36] McKay argues that video appearances threaten procedural justice – it "generates feelings of disconnection and isolation from the remote courtroom, subtly rendering prisoners as spectators to their own legal proceedings".[37] She goes on to say that defendants are "further disempowered verbally and physically, silenced and physically absent".[38] To uphold procedural justice and fulfil Te Ao Mārama, a face-to-face connection, or kanohi ki te kanohi, is best practice and should remain the standard approach for substantive proceedings. The benefits of efficiency or cost must be weighed against the defendant's right to be physically present and their right to a fair process. We have learned that we can conduct court hearings remotely. Just because we can does not mean that we always should.

Even where physically present, many people in court, including both defendants and victims, describe their experiences as not being truly seen, but instead being viewed as a case, a number, an object, something to be dealt with.

A young man in Remutaka Prison said to me: "I am more than just a piece of paper". He felt that all the Judge had seen was the piece of paper with his previous convictions and had not seen who he truly was as a person. It can be easy to fall into the trap of judges and lawyers talking directly to one another, to deal with the matter expeditiously, without engaging with the defendant before the court. Judges experience high caseloads – we are bursting at the seams in the District Court in particular – and the additional time taken to engage with defendants,

---

35 Tania Sourdin and others "COVID-19, Technology and Family Dispute Resolution" (2020) 30 ADRJ 270 at 278.

36 Carolyn McKay *The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix* (Routledge, New York, 2018) at p 157.

37 McKay, above n 36, at 174.

38 McKay, above n 36, at 174.

whānau and victims may seem only to make the time pressures greater. But it cannot be right to say that we have not the time to be procedurally fair. The time resource has to be provided if we are to be effective in our courts.

The steps to "see" a defendant are not difficult. Nor are they revolutionary. The positive effects of eye contact and other non-verbal cues are considerable. Greeting somebody by name, pronouncing their name correctly, acknowledging them and their whānau respectfully, continuing to refer back to them– all of these can make someone feel seen and acknowledged. One defendant has noted his positive experience in court as the following: "[the judge] looked at me as an individual and not as some person being accused of something".[39] They felt that they were seen as more than just a piece of paper. In other words, they felt that their dignity and mana were upheld.

Dignity is an integral component of being "seen". It is a right which "provides each of us with equal moral standing under the law".[40] The theme of dignity is threaded throughout domestic and international law. The first line of the preamble of the Universal Declaration of Human Rights recognises "the inherent dignity and…the equal and inalienable rights of all members of the human family".[41] Article 1 of the Declaration states that "all human beings are born free and equal in dignity and right".[42] In the Convention on the Rights of Persons with Disabilities, promoting respect for the inherent dignity of persons with disabilities is found in both the purpose and the principles.[43]

A similar concept exists in Te Ao Māori – that of mana. The Oranga Tamariki Act, in the 2019 reforms, introduced explicit recognition of mana tamaiti – defined as "the intrinsic value and

---

39 Rachel Swaner and others *What Do Defendants Really Think? Procedural Justice and Legitimacy in the Criminal Justice System* (Center for Court Innovation, New York, September 2018) at 28-29.

40 Grant Hammond "Beyond Dignity?" (paper presented to the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007).

41 *Universal Declaration of Human Rights,* above n 26, preamble.

42 Article 1.

43 *Convention on the Rights of Persons with Disabilities,* above n 27, arts 1 and 3.

inherent dignity derived from a child's or young person's whakapapa…and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person".[44] Recognising mana and mana tamaiti is an integral part of Te Ao Mārama. It is to ensure that people are "seen".

Heard

Of course, it is not enough to merely be physically present in court to feel that justice has been done. The four elements of Te Ao Mārama increase in the difficulty and effort required to fully uphold them – from being seen, to being heard, to being understood, and finally to meaningfully participating – arguably, the most difficult to achieve.

I turn now to the right to be heard in court. Again, this has two main meanings. The more surface-level meaning is the ability to speak in court and be heard without being silenced or interrupted. Following on from this is the opportunity to tell your side of the story and voice your perspective.

Various studies have shown that being unable to speak in court, or being cut off when speaking, is a major source of frustration for participants in court proceedings. Participants have reported feeling disrespected when court personnel did not give them an opportunity to speak and feeling silenced when cut off by a judge.[45] On the other hand, they experienced feelings of respect and fairness when they felt like the judge was listening to them, and the judge asked if they had any questions.[46]

I must emphasise again that making a court participant feel heard – and in fact actually hearing them – is not difficult. Many judges have been doing so their whole careers. Traditionally

---

44 Oranga Tamariki Act 1989, s 2(1). For sections in the Act that refer to mana tamaiti, see ss s 4(1)(a)(i), 4(1)(g), 5(1)(b)(iv), 7AA(2)(b), 13(2)(b)(ii), and 13(i)(iii)(C).

45 Swaner, above n 39, at vi-vii.

46 Swaner, above n 39, at 35.

participants are heard through their lawyers. Providing participants with the opportunity to speak directly, where this can be done without prejudicing their position, enables them to feel empowered and respected.

The right to be heard is more than just the ability to physically speak – it also involves telling your side of the story. A consistent theme of the calls for transformative change at the heart of Te Ao Mārama is the frustration and disempowerment that occurs when courts determine a sentence without taking into account the views of a particular group, such as victims.[47] People want to tell the court what has happened to them, from their perspective, and why. The right to express your views freely and have the views given due weight is recognised as important internationally and is included in conventions such as the United Nations Convention on the Rights of the Child and on the Rights of Persons with Disabilities.

The concept of dignity ties into the right to be heard as well. David Luban uses dignity as a justification for the role of a lawyer. His argument is that the right to counsel is connected with dignity in the following two respects: "first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard".[48] Navigating the courts is difficult, as is presenting a legal argument without any legal training. The lawyer is therefore crucial in enabling their client to present their side of the story and be heard.

Lawyers play a critical role in a solution focused court process . Once guilt has been accepted or established and the identification of the underlying causes becomes the focus , lawyers can see their role as assisting their client to avoid reoffending and driving the process towards that end . In all this they never cease being the protector of their clients rights.

---

47 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (2020) at 16.

48 David Luban, "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)" (2005) University of Illinois Law Review 815 at 819.

Being heard implies a two-way relationship, involving one person speaking and another person listening. That is crucial – that the judiciary actively listens to what those in the courtroom are saying, and that defendants, whānau and victims feel as if they have been listened to. This ties back to procedural fairness. Defendants or victims who have a chance to tell their side of the story, and who feel that their arguments have been considered, will have a positive perception of the process, regardless of the outcome.[49] The White Paper of the American Judges Association on procedural fairness put it this way: "from a litigant's point of view, if the judge does not respect litigants enough to hear their side or answer their questions, how can the judge arrive at a fair decision?"[50]

Understood

I turn now to the next element of Te Ao Mārama – that court participants feel, and in fact are, understood by judges and others in court proceedings. Being understood requires more, arguably, than being heard and being seen.

So, what does it mean to be understood? It means that the judge fully comprehends the participant's background and any underlying issues or factors that may be relevant. It means that the judge has knowledge of the participant's unique needs. It means that the judge has a solid knowledge basis from behavioural science on relevant areas such as family violence and neurodisabilities, that can lead to greater understanding of the person standing before them. It means that the participant feels that they have been listened to and understood. It means that the judge has knowledge of what life is like for the those who are overrepresented in our justice system.

---

49 Tyler "Procedural Justice and the Courts"

50 Burke and Leben, above n 21, at 12.

In order to achieve this understanding the courts and the communities they serve must become connected. Courts are seen by communities as something separate and unapproachable yet the authority given to courts to decide cases comes from the community. That is where courts derive their legitimacy. Much like the Peelian principle of policing by consent. Of course Judges must be independent in terms of decision making but that does not mean that judges need to be detached from the communities they serve. In addition much of the resource needed to deliver effective interventions for a court to operate in a solution focused way is found in communities.

Where there is that connection between a court and its community, and judges are knowledgeable about the current issues facing those in the community, it is more likely that those people will feel – and in fact be – understood.

One vehicle that is being increasingly used to bring information before the court, thus increasing the ability of a defendant to feel understood, is s 27 cultural reports.[51] Section 27 of the Sentencing Act 2002 allows any person to speak to the court about an offender's personal, family, whānau, community and cultural background. While originally intended to provide for an oral speaker to present to the court,[52] the section has been interpreted in recent years to allow for written reports, by independent report writers, including extensive information about an offender's background and how this relates to their offending. Importantly, however, as Whata J noted in *Solicitor-General v Heta,* "recognition of deprivation and personal trauma does not involve condoning the offending. Rather it helps to explain it".[53] While s 27 reports are an important way in which defendants feel understood, there are imperfections in their current working. Financial constraints and a lack of report writers limit the ability for all defendants to

---

51 Oliver Fredrickson "Re-thinking Systemic Deprivation Discounts" (2021) August Māori LR.
52 (12 June 1985) 463 NZPD 4759.
53 *Solicitor-General v Heta* [2018] NZHC 2453 at [66].

have a comprehensive report presented to the court.[54] This perpetuates what I have already referred to as "postcode justice", with regions having differing availability of report writers.

One feature of Te Ao Mārama is to restore the original intention of s 27 and encourage whānau and community members to engage with the sentencing process and provide this information orally in court. A statutory provision enabling this engagement with the Court is not a prerequisite for a Judge to invite or allow such information to be put before the Court.

Our specialist courts have developed practices that provide alternative ways for information to be brought before the court. Judges in specialist courts have access to detailed information about addiction, mental health, financial, social and cultural issues.[55] Often there is extensive information available in the youth and family jurisdictions, including psychological reports. In the Young Adult List, an information sharing protocol allows a judge in the Young Adult List to request information from the Youth Court and the Family Court. Te Ao Mārama envisages that practices such as these are not confined to individual courts, but are mainstreamed across all District Courts.

Of course, it is not only defendants who must feel understood, but also others in the courtroom, including victims. Reports such as *He Waka Roimata* express the frustration and disempowerment that victims feel in the courtroom, where they feel misunderstood and as if their views are not taken into account.[56] A study in the United Kingdom found that only 55 per cent of victims or witnesses in criminal proceedings would be prepared to take part in criminal proceedings on a future occasion.[57] This means that almost half of all victims or witnesses have

---

54 Oliver Fredrickson "Getting the Most Out of Section 27 of the Sentencing Act 2002" (2020) November Māori LR.

55 Chief Judge Heemi Taumaunu "mai te pō ki te ao mārama: the transition from night to the enlightened world: Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture 2020) at 24.

56 Te Uepū Hāpai i te Ora*,* above n 47, at 16.

57 *The Secret Barrister* (Macmillan, London, 2018) at 136-137.

had such a negative experience in the criminal justice system that they would not be prepared to do it again. As the anonymous author of *The Secret Barrister* writes:[58]

> If they witnessed your daughter being mugged, they would not assist in bringing her assailant to justice. If you were falsely accused of assault, they would not come forward to say that they saw you acting in self-defence. If they were themselves a victim, they would not entrust the justice of that crime to the state, preferring, one infers, that the miscreant go unpunished, or be subject to a more immediate, possibly divine, form of retribution.

For victims to have a more positive perception of the criminal justice system, they need to be included more in the process. They, also, need to be understood.

Meaningful Participation

The final component of Te Ao Mārama involves meaningfully participating in court proceedings. This is particularly affected by the brain and behaviour differences, including neurodisabilities, that I have mentioned earlier.

These brain and behaviour differences act as barriers to participation and engagement in court. The statistics I mentioned earlier mean that it is more likely than not that a person appearing before a judge in court will have some kind of disability that will interfere with their ability to fully participate. The formal and sometimes archaic nature of the court system can make it difficult for anyone to participate, let alone those with additional barriers. The language used in court is complicated, and often meaningless to those who have not been legally trained.

Bail conditions include terms such as “not to associate with”, “not to reside at”, or “not to consume” drugs and alcohol – these are not words which are used in everyday life. It is difficult

---

58 At 137.

to participate in proceedings if you are not able to understand them in the first place. The court process is reliant on written documents which can put groups such as those with dyslexia at an immediate disadvantage.

Judge Carlie J. Trueman from British Columbia said the following:[59]

> The cognitively challenged are before our Courts in unknown numbers.
>
> We prosecute them again, and again, and again.
>
> We sentence them again, and again, and again.
>
> We imprison them again, and again, and again.
>
> They commit crimes again, and again, and again.
>
> We wonder why they do not change.
>
> The wonder of it all is that we do not change our expectations rather than trying to change them.

This eloquently describes the need for procedural accommodations in court – to change our practices, procedures and expectations, rather than trying to change the people themselves.

I compare this to what we automatically do when someone in court cannot understand English. That person is, without question, provided with an interpreter so that they can understand the proceedings. In fact, the right to free assistance of an interpreter in court is enshrined in our Bill of Rights Act.[60] When someone does not understand proceedings because of a neurodisability, they should also be provided with assistance to ensure that they understand what is being said and are able to participate.

---

59 *R v Harris* 2002 BCPC 0033 at [167].
60 New Zealand Bill of Rights Act 1990, s 24(g).

The Oranga Tamariki Act goes some way toward this, requiring that children and young people are given reasonable assistance to understand what is being said in court.[61] However, the rights and protections for those with neurodisabilities are nowhere near as great as for those who do not speak or understand English. Te Ao Mārama aims to address this by ensuring that everybody in court, regardless of their means or ability, is able to understand and meaningfully participate in court proceedings.

This involves everyone in court speaking in plain language which is able to be understood by all, taking breaks if needed, explaining any necessary legalese or complicated procedures.

These ideas have been influenced to a great extent by the Young Adult List in Porirua, which began in early 2020, and was predicated on the need to change procedures in court to ensure procedural fairness for young adults who, by virtue of their age, have demonstrably different brain architecture than adults.[62] Many principles of Te Ao Mārama reflect the principles and processes of the Young Adult List and so I would like to take the time to discuss the establishment of this list.

The Young Adult List stemmed from the idea that jurisdictional age limits in the New Zealand justice system are arbitrary and do not reflect actual brain development.[63] A young person appearing in the Youth Court is provided with wrap-around support from a multi-agency team specifically trained in dealing with adolescents. The judges speak to the young people in plain language, the courtroom is arranged in a less formal manner and the young person is assisted to help understand and participate in court proceedings. Yet when that same young person, with the high prevalence of disability I talked about earlier, turns 18, they are treated as a fully-

---

61 Oranga Tamariki Act 1989, s 11(2)(aa).

62 Elise White and Kimberly Dalve *Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City's Young Adult Courts* (Center for Court Innovation, New York, 2017).

63 See Stephen Woodwark and Nessa Lynch "'Decidedly but Differently Accountable?' Young Adults in the Criminal Justice System" [2021] 1 NZ Law Rev 109.

functioning adult who is suddenly able to fully understand court processes and participate. Add to this that the brain of the young person will not be fully developed.

Research now consistently indicates that a person's brain doesn't fully develop until they are at least in their mid-twenties. Underdeveloped parts of the brain include those that affect executive functioning and assessment of risk and consequences. In addition to this, we must consider the high rates of neurodisabilities which I have already discussed. These two overlapping factors justify a court process that recognises the limited executive functioning and the need for a different approach.[64]

The Young Adult list in Porirua seeks to address this fairness issue. Every person charged with any offence in the Porirua District Court who is aged 18 to 25 years old is separated out from the existing list court and placed in their own list, held every Friday. There, they appear in court with a dedicated multidisciplinary team that provides the young adults with wraparound, specialist support. This includes services such as Bail Support Officers, Adolescent Specialist Probation Officers, Adolescent Mental Health Nurses and Māori, Pacific and Ethnic Services. The architecture of the courtroom is changed to engender participation, allowing the defendant to be closer to their lawyer, and there is a great emphasis placed on avoiding legal jargon and using simple language. Information sharing protocols are in place and there is consistency of judiciary to enable connection between the young adults and the judge. To a large part, the Young Adult List mirrors practices in the Youth Court.

When Chief Judge Taumaunu talks about court participants being able to meaningfully participate in cases concerning them, I suggest that the Young Adult List sets the standard for

---

64 Judge Jan-Marie Doogue and Judge John Walker "Proposal For a Trial of Youth Adult List in Porirua District Court" (29 August 2019) The District Court of New Zealand < https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/trial-of-young-adult-list-proposal/>.

what that entails. Of course, the Young Adult List is still on a journey and has work to be done. But it is a step in the right direction.

Meaningful participation is the cornerstone of procedural fairness. If a person is merely a bystander in their own proceedings, how can it be said that those proceedings are fair? A fair hearing requires that those involved in proceedings are able to engage – with the judge, and others in the courtroom. In a way, meaningful participation is the culmination of being seen, heard and understood, as well as the participant themselves understanding the proceedings. When these elements are fulfilled, the person in court can understand and appreciate the reasons for any court decision, rather than feeling that the decision was unfair because they were not a part of it.[65]

Conclusion

This pursuit of fairness in the process of the court underpins the vision of Te Ao Mārama. It does seem to be a rather basic aim. In one sense it ought not be revolutionary to ensure that all who come to our courts are seen, heard, understood, and are enabled to meaningfully participate in the case, but it will require all of us to come together to achieve it – judges, lawyers, police, court staff, all the agencies in court, and importantly the communities being served. Our courtrooms should be unrecognisable to our Victorian time traveller.

"No army can withstand the strength of an idea whose time has come" – Victor Hugo.

Tena koutou, tena koutou, Tena koutou katoa

---

65 Antoinette Robinson and Professor Mark Henaghan "Children: heard but not listened to? An analysis of children's views under s 6 of the Care of Children Act 2004" (2011) 7 NZFLJ 39 at 43.